

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 281.

MERRILL-RUCKGABER COMPANY, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 12, 1914.

(24,435)



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1 *I. Petition. Filed June 11, 1910.*

In the Court of Claims of the United States,

No. 30699.

MERRILL-RUCKGABER COMPANY, a Corporation, Claimant,
vs.
THE UNITED STATES OF AMERICA.

To the Honorable the Judges of the United States Court of Claims:

The petition of the Merrill-Ruckgaber Company, a corporation, respectfully shows:

I. Your petitioner is a corporation duly created and existing under the laws of the State of New York for the purpose of carrying on a general engineering and contracting business and has its office and place of business in the city and State of New York. Your petitioner has at all times borne true faith and allegiance to the Government of the United States and it has not in any way aided or abetted or given encouragement to rebellion against the said Government.

2 II. That on or about the 24th day of May, 1909, your petitioner entered into and executed a contract in writing with the United States of America, which was represented in the making and execution thereof by J. B. Reynolds, Acting Secretary of the Treasury, for the construction of the foundation for the extension, remodeling, etc., of the United States Assay Office in New York, N. Y., for the sum of \$79,400.00, in accordance with the specifications forming a part thereof, dated February 26, 1909, and the addendum to said specifications, dated March 18, 1909.

Said original specifications, in the fourth paragraph thereof, under the head of "Excavation," contained the following clause, to wit: "The walls, etc., will have to be removed and the excavation made in such a manner as not to endanger adjoining property nor prevent the occupancy of the present front building, and all necessary shoring, underpinning, etc., in connection therewith must be done." This clause, by said addendum to said specifications made prior to the execution of said contract, was modified as follows: "Page 7, 4th paragraph, under 'Excavation,' after the clause 'and all necessary shoring, underpinning, etc., in connection therewith must be done,' add 'in the case of the building joining the north line of the site, the underpinning of the main rear walls must be carried to rock by a method satisfactory to the Supervising Architect.' "

Said contract and the specifications and addendum to said specifications are here brought into court and it is prayed that they may be referred to and taken as a part hereof.

III. At the time the aforesaid contract was entered into and at all times during the progress of the work thereunder the only build-

ing "joining the north line of the site" having any rear walls as set forth in the aforesaid addendum to said specifications was the building and premises known as numbers 27 and 29 Pine Street, New

3 York city. While your petitioner was proceeding faithfully and strictly to conform to its said contract and said specifications and addendum requiring it to underpin to rock the main rear walls of said building 27 and 29 Pine Street, it received directions in writing from the Supervising Architect of the Treasury also to underpin to rock the "rear wall" of the building and premises known as No. 25 Pine Street, New York city. As said building had no rear wall "joining the north line of the site" of the work of excavation covered by your petitioner's said contract, your petitioner protested against being required to do any underpinning to rock in connection with said building, and on said Supervising Architect persisting in his order for this additional work, your petitioner appealed to the Secretary of the Treasury, and on or about November 6, 1909, the Acting Secretary of the Treasury addressed a letter to the petitioner ratifying and confirming the order for this work given by said Supervising Architect and directing your petitioner to underpin to rock said building No. 25 Pine Street in accordance with said order.

IV. Your petitioner therefore proceeded with and fully and satisfactorily completed the work required by its said contract and received compensation therefor in accordance with the terms of its said contract, and also proceeded with and completed, under protest, the underpinning to rock of said building 25 Pine Street, New York city, which was not covered by the provisions of said contract and specifications, but was wholly additional and supplemental thereto, and said additional and supplemental work was duly accepted by the defendant acting through its officers and agents authorized to accept the same, and the defendant received and has ever since enjoyed the benefit thereof.

And this petitioner avers that in complying with said orders and directions and in doing said additional and supplemental work of underpinning to rock said premises 25 Pine Street it expended for

4 labor and materials necessarily entering into the same over and above the work done and materials furnished under said contract the sum of four thousand four hundred seventy-five dollars and ninety cents (\$4,475.90).

Wherefore your petitioner claims that an obligation arose upon the part of the defendant to pay to it said sum of \$4,475.90, the fair and reasonable value of said additional and supplemental work, but your petitioner says that no payment has ever been made to it by the defendant for or on account of any of said work and the materials and labor entering into the same, and it is justly entitled to recover of the United States the total amount thereof, to wit, the sum of \$4,475.90.

V. Your petitioner says that no assignment or transfer of its aforesaid claim, or any part thereof or interest therein, has ever been made, and your petitioner is entitled to the amount above stated after allowances of all just credits and offsets.

Wherefore your petitioner prays judgment against the United States of America for the total sum of \$4,475.90.

MERRILL-RUCKGABER COMPANY,
By OGDEN MERRILL, *President.*

Attest:

ALBERT RUCKGABER,
Secretary.

STATE OF NEW YORK,
City of New York, ss:

I, Ogden Merrill, being first duly sworn, do depose and say that I am the president of the Merrill-Ruckgaber Company, a corporation, which corporation is named as party claimant in the foregoing petition. I have read said petition and know the contents thereof, and the facts therein stated are true to the best of my knowledge, information and belief.

OGDEN MERRILL.

5 Subscribed and sworn to before me this 10th day of June,
A. D. 1910.

[Seal of Laura E. Smith, Notary Public, Kings County.]

LAURA E. SMITH,
Notary Public, Kings County.

Certificate filed in New York County.

McKENNEY & FLANNERY,
Attorneys for Claimant,
Hibbs Building, Washington, D. C.

6 II. *Traverse. Filed March 31, 1914.*

In the Court of Claims of the United States, December Term, A. D.
1913.

No. 30699.

MERRILL-RUCKGABER CO.
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.
J. R. W.

III. Argument and Submission of Case.

On March 31, 1914, this case came on to be heard. Mr. John Spalding Flannery was heard for the claimant; Mr. Charles F. Jones was heard in opposition and the case was submitted.

*IV. Findings of Fact, Conclusion of Law, and Opinion.
Filed June 1, 1914.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

*Findings of Facts.***I.**

The claimant is a corporation duly created and existing under the laws of the State of New York for the purpose of carrying on a general engineering and contracting business, with its principal office and place of business in New York City.

II.

On or about February 26, 1909, the United States, acting therein through the Supervising Architect of the Treasury, invited proposals for the construction of the foundation for the extension, remodeling, etc., of the United States assay office building in the city of New York, in accordance with drawings and specifications prepared in the Office of said Supervising Architect. These specifications contained among other the following provisions:

Under the heading of "Extent of work":

"The bidders should visit the site and fully inform themselves of the character of the same and the conditions under which the work is to be performed, and failure to do so will in no way relieve the successful bidder from the necessity of furnishing any materials or performing any labor that may be required to complete the work in accordance with the true intent and meaning of the specifications and drawings without additional cost to the Government."

Under the heading "Explanations of drawings":

"This specification is intended to supplement the drawings, and therefore it will not be the province of the specification to mention any portion of the construction which the drawings are competent to explain, and such omission is not to relieve the contractor from carrying out such portions only indicated on the drawings, and

should items be required by the specifications not indicated on the drawings they are to be supplied, even if of such nature that they could have been indicated thereon. Any items which may not be indicated on the drawings or mentioned herein, but are necessary to complete the entire work, must be supplied in place. The decision of the Supervising Architect as to the

proper interpretation of the drawings and specifications shall be final."

Under the heading "Excavation":

"Certain portions of old foundation walls, etc., have been left in place as retaining walls in connection with adjoining buildings; the removal of these walls and the north wall and so much of the present front building as may be necessary to install work under this contract and such other excavation in connection therewith as may be necessary are to be included. * * *

"The walls, etc., will have to be removed and the excavation made in such a manner as not to endanger adjoining property nor prevent the occupancy of the present front building, and all necessary shoring and underpinning, etc., in connection therewith must be done."

III.

Subsequently, and on or about March 18, 1909, said Supervising Architect sent to all parties from whom proposals had been solicited the following addendum, amending the foregoing paragraph of the specifications:

"Bidders are hereby informed that the specification is to be amended as follows: Page 7, fourth paragraph, under 'Excavation,' after the clause 'and all necessary shoring, underpinning, etc., in connection therewith must be done,' add 'In the case of the building joining the north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the Supervising Architect.'"

IV.

On April 2, 1909, after receipt by it of said addendum, the plaintiff submitted its proposal to furnish all labor and material required for said work for the sum of \$79,400, and on May 22, 1909, the United States, acting therein through J. B. Reynolds, Assistant Secretary of the Treasury, sent the claimant a communication accepting its said proposal in the following language:

"In accordance with department approval of the 18th instant, your proposal, dated April 2, 1909, the lowest received under advertisement of February 26, 1909, and opened April 3, 1909, in amount seventy-nine thousand and four hundred dollars (\$79,400.00), is accepted to furnish all the labor and materials required for the construction of the foundation for the extension, remodeling, etc., of the United States, assay office building, New York, N. Y., in strict accordance with drawings numbered 101 and 102, such other drawings as may be furnished, the specification dated February 26, 1909, and the addendum thereto dated March 18, 1909, and the instructions of the superintendent.

"One set of drawings and specifications is forwarded herewith for your use, and any additional sets desired will be furnished you upon application to the Supervising Architect.

10 "It is understood and agreed that the entire work is to be completed by December 31, 1909, instead of November 1,

1909, the time named in your proposal, this extension being made to correspond with the delay in awarding the work.

"It is understood and agreed that you are required to execute a formal contract, with bond, in the sum of one hundred and twenty-five thousand dollars (\$125,000.00), guaranteeing the faithful performance of the work embraced in this acceptance, a form for which will be forwarded you. This contract, with bond, must be executed in strict accordance with the rules printed at the head of said form and be returned to the Supervising Architect of this department at once. * * *

V.

On or about May 24, 1909, the United States, acting thereto through J. B. Reynolds, Acting Secretary of the Treasury, entered into a contract in writing with the claimant for the performance of said work for said price of \$79,400. Said contract contained, among others, the following pertinent provisions:

"Witnesseth, that the party of the second part, for the consideration hereinafter mentioned, covenants and agrees to and with the party of the first part to furnish all of the labor and materials and do and perform all the work required for the construction of the foundation for the extension, remodeling, etc., of the United States assay office in New York, N. Y., in strict and full accordance with the requirements of drawings numbered 101 and 102, and such other detail drawings and models as may be furnished to the party of the second part by the Supervising Architect of the United States Treasury Department; the advertisement for proposals, dated February 26, 1909; the specification for the work; the proposal dated April 2, 1909, addressed to the said Supervising Architect by the said party of the second part; and letter dated May 22, 1909, addressed to the said party of the second part by J. B. Reynolds, Assistant Secretary of the Treasury, accepting said proposal; and the addendum, dated March 18, 1909, to said specification; a true and correct copy of each of which said papers is attached hereto and forms a part of this contract; and which said numbered drawings, bearing the signature of the said Supervising Architect and the signature of the said party of the second part, are on file in the office of the Supervising Architect of the United States Treasury Department, and are hereby made part of this contract.

"It is further covenanted and agreed by and between the parties hereto that the said party of the second part will, without expense to the United States, comply with all the municipal building ordinances and regulations, in so far as the same are binding upon the United States, and obtain all required licenses and permits, and be responsible for all damages to person or property which may occur in connection with the prosecution of the work; that all work called for by the drawings and specifications, though every item be not particularly shown on the first or mentioned in the second, shall be executed and performed as though such work were particularly shown and mentioned in each, respectively, unless otherwise specifically pro-

vided; that all materials and work furnished shall be subject
11 to the approval of the said Supervising Architect; and that
said party of the second part shall be responsible for the
proper care and protection of all materials delivered and work per-
formed by said party of the second part until the completion and
final acceptance of same.

"It is further covenanted and agreed by and between the parties
hereto that the said party of the second part will make any omissions
from, additions to, or changes in, the work or materials herein pro-
vided for whenever required by said party of the first part; the valua-
tion of such work and materials to be determined on the basis of the
contract unit of value of material and work referred to; or, in the
absence of such unit of value, on prevailing market rates, which mar-
ket rates, in case of dispute, are to be determined by the said Super-
vising Architect, whose decision with reference thereto shall be bind-
ing upon both parties, and that no claim for damages on account of
such changes or for anticipated profits shall be made or allowed.

"It is further covenanted and agreed that no claim for compensa-
tion for any extra materials or work is to be made or allowed, unless
the same be specifically agreed upon in writing or directed in writing
by the party of the first part, and that no addition to, omission from,
or changes in the work or materials herein specifically provided for
shall make void or affect the other provisions or covenants of this
contract, but the difference in the cost thereby occasioned, as the
case may be, shall be added to or deducted from the amount of the
contract, and in the absence of an express agreement or provision to
the contrary no addition to or omission from or changes in the work
or materials herein specifically provided for shall be construed to
extend the time fixed herein for the final completion of the work.

"It is further covenanted and agreed by and between the parties
hereto that all materials furnished and work done under this contract
shall be subject to the inspection of the Supervising Architect, the
superintendent of the building, and of other inspectors appointed by
the said party of the first part, with the right to reject any and all
work or material not in accordance with this contract, and the de-
cision of said Supervising Architect as to quality and quantity shall
be final."

VI.

The assay office extension was located practically in the middle of
the block bounded by Wall, Nassau, Pine, and William Streets. The
buildings surrounding the site of the excavation for the work were
the old assay office on the south, the subtreasury on the west, the two
buildings, 25 Pine Street and 27 and 29 Pine Street, on the north,
and the Gallatin Bank Building on the east.

The building known as 25 Pine Street was 10 stories, and the
building known as 27 and 29 Pine Street was 13 stories above Pine
Street, and each of these buildings was one story higher at the line of
the assay office extension.

When the claimant submitted its detail drawings showing the pro-
posed method of underpinning and protecting walls of the Pine

Street buildings, the Supervising Architect telegraphed to the claimant on August 3, 1909, as follows:

"Referring to blue prints submitted by you showing underpinning buildings Pine Street, please state why drawing does not show underpinning 25 Pine Street extending to rock."

12 To which the claimant replied on the same day:

"We are in receipt of your telegram under date of August 3, and in reply will say that according to the addendum to the specifications for the foundation of the extension, remodeling, etc., of the United States assay office building at New York, N. Y., we understand that the 'building' referred to means 27-29 Pine Street, as No. 25 Pine Street has no rear wall; it is simply a light metallic curtain wall which is supported on the side walls. We did not consider that there was any rear wall in this building, therefore we showed the side walls to be taken care of in the usual manner and believe our method so provides."

Thereupon much correspondence ensued between the claimant and the Supervising Architect in reference to the contract requirements and necessity for underpinning to rock of the building No. 25 Pine Street, and on October 20, 1909, the claimant was directed by the Supervising Architect to proceed with the work of underpinning said building, 25 Pine Street, to rock, as follows:

"The receipt is acknowledged of your letter of the 15th instant, and the statements made therein are noted. In reply you are advised that the position of the office in regard to underpinning to rock of No. 25 Pine Street in connection with your contract for the foundations of the extension, remodeling, etc., of the assay office, New York, N. Y., was fully set forth in its letter of the 2d instant, and the office is of the opinion that this work is required by the terms of your contract and that you are not entitled to extra therefor. You are therefore directed to carry out this portion of your contract without further delay and in accordance with office letter of the 2d instant."

The claimant thereupon on October 28, 1909, notified the Supervising Architect that the estimated cost of underpinning to rock the two southernmost columns of the east and west walls of said building, 25 Pine Street, would be \$4,800 in addition to the price named in said contract, and concluded its said communication with the following statement:

"As the contract does not expressly or impliedly require us to underpin to rock premises 25 Pine Street, we shall proceed with the work under the contract, taking necessary steps to protect said premises, but will not underpin any portion thereof to rock except upon the understanding that we are to be paid the reasonable cost thereof, as indicated above."

To which the Supervising Architect replied, on October 30, 1909:

"Your statements are noted and you are now directed to proceed without further delay to complete the work in line with office letters of the 2d, 20th, and 26th instants, and without expense to the Government. And you are advised that unless you take action along this line within a reasonable time consideration will be given to serv-

ing the eight days' notice preparatory to the Government assuming charge of the work and completing it at your expense."

Upon appeal to the Secretary of the Treasury the action of the Supervising Architect was ratified, and the claimant was directed in writing by the Secretary to proceed with said underpinning in accordance with the requirements of the Supervising Architect,
13 otherwise the contract would be completed at claimant's expense. The claimant did the work under protest, and completed it and all of the work under said contract within the time stipulated in the contract. The actual cost of underpinning to rock said building No. 25 Pine Street was \$4,450. The contractor was paid the full amount of the contract price, \$79,400.

VII.

In order to underpin said premises to rock, the claimant was required to sink two cylinders, one under the last column on the east side of the building, 25 Pine Street, and one under the last column on the west side of said building. To do this it was necessary to remove the earth from under these columns and sink the cylinders to rock in the excavations made for them. In connection with the sinking of the cylinder under the east side of the building a drift or tunnel, $10\frac{1}{2}$ feet long, 6 feet wide and 6 feet high, had to be run from the extreme rear of the foundation to a point under the column and from this drift the cylinder was sunk to rock, to a depth of approximately 40 feet. On the west side a drift 5 feet wide, 5 feet deep and 6 or 7 feet high was made and a similar cylinder sunk to the same depth. Each cylinder or caisson was built of concrete and steel and was $3\frac{1}{2}$ feet in diameter.

VIII.

Prior to the receipt by the claimant of the order of the United States to protect the rear wall of the building, No. 25 Pine Street, by underpinning to rock, claimant had proposed to protect said building by means of horizontal beams projecting through the building and supported on the ground by blocks and posts called rakers and needle beams. This was the method adopted as to the Gallatin Bank Building, the foundation of which extended below the depth of the proposed excavation.

The cost of the method of protecting by shoring up with timbers was nominal as compared with the cost of underpinning.

IX.

The use of the word "building" in the addendum to the specifications was the result of a clerical error in the Office of the Supervising Architect of the Treasury. Between the date of the issuing of the specifications and the time of opening the bids the drafting and construction division of the Supervising Architect's office concluded that it was necessary to underpin to rock the two buildings, 27 and 29 Pine Street and 25 Pine Street, and, in order that the bid

and subsequent contract might cover all of the work, that division prepared a memorandum for the addendum to the specifications to be sent to all bidders, which read:

"Bidders are hereby informed that the specification is to be amended as follows:

"Page 7, fourth paragraph, under 'Excavation,' after the clause 'and all necessary shoring, underpinning, etc., in connection therewith must be done' add 'In the case of the buildings joining north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the Supervising Architect.'"

14 This memorandum for the addendum was, in due course, sent to the computing division of said office, where the word "buildings" was inadvertently changed to "building" in the addendum to the specifications, which was sent to claimant under date of March 18, 1909.

Before submitting a proposal for the work the claimant, through its president and agents, made an investigation of the site of the work and the buildings surrounding said site, and ascertained that the rear of both the buildings, Nos. 25 and 27 and 29 Pine Street, were closed to said site on the north.

In the main rear walls of said buildings the weight above the first floor was transferred to and carried on columns.

The claimant, under the direction of the Supervising Architect, protected both of said buildings adjoining on the north by underpinning to rock in the manner following: The three columns which supported the building, 27-29 Pine Street, were underpinned; that is, excavations were made to rock under these columns and concrete piers were built up until they were keyed under these columns or girders, thus forming vertical piers from the girders down to bed-rock, and under the foundations supporting the two columns of 25 Pine Street similar concrete piers were carried to rock.

X.

The building known as 25 Pine Street was 10 stories in height above Pine and 11 stories above Wall Street.

The main rear wall of the building 27 and 29 Pine Street is of brick and masonry, and above the level of the first story is carried on the steel frame of the building. This steel frame is supported by columns which extend down to the basement line and are carried there on a system of built-up steel girders filled in with concrete, making a broad foundation for the columns.

The main rear wall of the building No. 25 Pine Street is of angle iron covered with sheet metal and is carried by columns of steel resting on corner columns of the building. The weight above the first floor is transferred to the side walls and columns and from the columns to the foundation.

The distance from the foundation line of the assay office extension building to the center of the nearest column of 27-29 Pine Street is 9½ feet.

The distance from the foundation line of the assay office extension building to the center of the nearest column of 25 Pine Street is $5\frac{1}{2}$ feet.

The excavation for the cellar floor of the assay office building extended about 15 feet deeper than the foundations of said buildings 25 Pine Street and 27 and 29 Pine Street.

The Gallatin Bank Building which adjoins the assay office building on the east is about the same height as 27 and 29 Pine Street. The foundation of the Gallatin Bank Building extended below the proposed excavation of the assay office building.

The substrata underlying the buildings in the block in question is quicksand, extending from 2 or 3 feet below the surface to within a few feet of bedrock 50 feet below, a condition well known to contractors in New York and to claimant's engineer.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is not entitled to recover, and its petition is therefore dismissed.

Opinion.

Atkinson, J., delivered the opinion of the court:

The addendum to the specifications reading as follows: "In the case of the building joining the north line of the site, the underpinning of the rear main walls must be carried to rock by a method satisfactory to the Supervising Architect." was sufficient to attract the contractor's attention to something being required which might be additional to the mere general terms of the specifications expressed in the terms "The walls, etc., will have to be removed and the excavation made in such a manner as not to endanger adjoining property * * * and all necessary shoring, underpinning, etc., in connection therewith must be done."

There were two buildings joining (or practically joining) the north line of the site. This fact was open to ordinary observation—it was obvious—and no question is raised upon the fact that the condition was alike known to both parties to the contract. The insistence of the claimant is that inasmuch as the specifications, with the addendum inserted referred to "the building" he understood and had a right to understand that only one of the said two buildings was included in the terms of his bid and contract and that therefore the Supervising Architect had no right to require him to underpin the building No. 25 Pine Street. In other words, he contends that as the contract, of which the specifications are a part, used the word building instead of buildings, he was required by it to underpin one and not two buildings.

If the contract between the parties clearly refers to a particular building the main rear wall of which was to be underpinned, then claimant could not be required under the contract in question to

underpin another and distinct building under the general provision of the contract that "the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications shall be final," because in such case the agreement between the parties would control, and being clear and distinct would not call for interpretation, or authorize a decision by the Supervising Architect contrary to its terms. *United States v. Stage Company*, 199 U. S., 44.

But it has been repeatedly held that parties to a contract may agree to submit differences of views in the interpretation of drawings and specifications to the decision of an architect or engineer and the validity of such an agreement is unquestionable, in the absence of bad faith, fraud, or a failure to exercise an honest judgment. *Kihlong's case*, 97 U. S., 398; *Sweeney's case*, 109 U. S., 62; *Barlow's case*, 184 U. S., 123, 133.

The court should, in construing a contract, ascertain the intention of the parties and to that end will as far as possible ascertain the situation of the parties as well as the purposes had in view. *Merriam v. United States*, 107 U. S., 437, 441; *Brawley's case*, 96 U. S., 168, 173; *Richmond Co. v. Eureka Co.*, 103 U. S., 839, 846.

16 And we must look to all of the contract in order to find its intention, for it is not allowable to disassociate a single phrase, term, or word from the context and give to it a meaning independent of the other terms of the instrument. *O'Brien v. Miller*, 168 U. S., 287, 297.

The work contemplated by the advertisement by the Government involved excavation in an area surrounded by buildings. On the east was the Gallatin Bank Building, the foundations of which extended deeper than the proposed excavation for the annex to the assay office building; on the west was the subtreasury building; on the south the assay office building to which the addition was being made; and on the north two buildings, numbered respectively 27 and 29 Pine Street and 25 Pine Street, the rear foundations of which did not extend to the depth of the proposed excavation. The specifications admonished the contractors as follows:

"The bidders should visit the site and fully inform themselves of the character of the same and the conditions under which the work is to be performed, and failure to do so will in no way relieve the successful bidder from the necessity of furnishing any materials or performing any labor that may be required to complete the work in accordance with the true intent and meaning of the specifications and drawings without additional cost to the Government."

Under the head of "Excavation" it is among other things stated:

"Certain portions of the old foundation walls, etc., have been left in place as retaining walls in connection with adjoining buildings; the removal of these walls, and the north wall and so much of the present front building as may be necessary to install work under this contract and such other excavation in connection therewith as may be necessary are to be included."

The claimant's president visited the site of the proposed work, as did also his engineer. The surrounding conditions were known to them. They knew that there were two buildings, the rear of which

adjoined the site; one of these, 27 and 29 Pine Street, was built up of brick or masonry from the top of a one-story extension, while the other from the top of the first story extension was constructed of metallic sheets supported on the framework of the building. The weight at the rear of the building, No. 25 Pine Street, was carried on pillars at either end of the side walls, and the south ends of these walls were several feet nearer the proposed excavation than was the rear wall of the other building.

A question which naturally arises under these conditions is why did the contractor determine that the rear wall of No. 27 and 29 Pine Street was to be underpinned and No. 25 was not to be underpinned? He says the contract called for underpinning "the rear walls of a building," but which building? The building had but one rear wall and the specifications called for underpinning rear walls of a building. The extension of the east and west walls of No. 25 Pine Street toward the site of the proposed excavation, and the fact that the weight of the rear wall was carried by means of a girder to the corners, had, it seems to us, the effect of making those corners or pillars carry more weight than would have been superimposed if the rear wall had extended to the ground for support, and as a consequence any excavation near these corners would be attended
17 with more danger to the building or walls, tending, as it would, to remove lateral support. The proof shows that these walls should have been underpinned. If the contractor was uncertain as to the meaning of the addendum to the specifications he could, upon inquiry before bidding, have been informed by the Supervising Architect.

He chose to act without making inquiry and we can not agree that the contract authorized him to select the building to be underpinned or that it meant that only one rear wall was to be underpinned. Reading the whole contract it seems to us its intention was to provide for the underpinning which the contractor was subsequently required by the architect to do.

While we doubt the relevancy and competency of the testimony adduced tending to show that the engineer who suggested the addendum to the specifications provided in his memorandum for the underpinning of the walls of the two buildings and that when this suggestion was written out "buildings" were expressed in the singular number, we do not see, if relevant or competent testimony, how the said fact can aid the claimant, because it plainly shows that the intention from the beginning was to require the underpinning of both buildings and that by a mere clerical error the word intended to be used as denoting a plural was made to denote a singular number.

Our conclusion is that the petition should be dismissed, and it is so ordered.

18 V. *Judgment of the Court Dismissing Petition.*

At a Court of Claims held in the City of Washington on the first day of June, 1914, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of the claimant, Merrill-Ruckgaber Company, a Corporation, be, and the same is hereby dismissed.

BY THE COURT.

19 VI. *Application for and Allowance of Appeal.*

And now comes the claimant in the above entitled cause and prays an appeal to the Supreme Court of the United States to review the judgment rendered herein on, to wit, June 1, 1914.

F. D. McKENNEY,
J. S. FLANNERY,
WM. HITZ,
Attorneys for Claimant.

Filed August 25, 1914.

Ordered: That the above appeal be allowed as prayed for.
November 9, 1914.

BY THE COURT.

20

In the Court of Claims.

No. 30699.

MERRILL-RUCKGABER COMPANY, a Corporation,
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the Court; of the opinion of the Court; of the final judgment of the Court; of the application of the claimant for, and the allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 12 day of November, A. D., 1914.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 24,435. Court of Claims. Term No. 281. Merrill-Ruckgaber Company, appellant, vs. The United States. Filed November 12th, 1914. File No. 24,435.



Office Supreme Court, U. S.

FILED

FEB 8 1916

JAMES D. MAHER

Clerk

13
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 281.

MERRILL-RUCKGABER COMPANY, APPELLANT,

v.
U.S.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,

Attorneys for Appellant.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 281.

MERRILL-RUCKGABER COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

Preliminary Statement.

This is an appeal from a judgment of the Court of Claims dismissing the petition of the claimant below and denying its right to recover the cost of underpinning to bed rock, by means of cylinders of steel and concrete, at a cost of \$4,450, the southernmost columns of the east and west walls of the building 25 Pine street, New York City, which underpinning said claimant contended was in addition to the work called for by a contract which it had made with the United States for the construction of the foundation for an extension of the United States Assay Office in said

city, which adjoined the premises underpinned on the south.

By an addendum to the specifications upon which the claimant's proposal was based the United States called for underpinning to rock the main rear walls of the "*building*" joining the north line of the site of the Assay Office foundation. The claimant understood this to mean 27-29 Pine street, which had a heavy masonry wall, and was proceeding to underpin this latter building to rock when it was compelled to also underpin in the same manner the adjacent building, 25 Pine street (which had a light metal curtain wall), upon the ground that two buildings were intended by this addendum, although but one was expressed.

Essential Facts Found by the Court Below.

On or about February 26, 1909, the United States, acting therein through the supervising architect of the Treasury, invited proposals for the construction of the foundation for the extension, remodeling, etc., of the United States Assay Office building in the city of New York in accordance with drawings and specifications prepared in the office of said supervising architect. These specifications, under the heading "Excavation," contained the following provision:

"The walls, etc., will have to be removed and the excavation made in such a manner as not to endanger adjoining property nor prevent the occupancy of the present front building, and all necessary shoring, underpinning, etc., in connection therewith must be done. The contractor shall furnish complete drawings showing the shoring for floors, etc., in the present front building as completed" (R., 5).

Subsequently, and on or about March 18, 1909, said supervising architect sent to all parties from whom proposals had been solicited the followig addendum, amending the foregoing paragraph of the specifications:

"Bidders are hereby informed that the specification is to be amended as follows: Page 7, fourth paragraph, under 'Excavation,' after the clause 'and all necessary shoring, underpinning, etc., in connection therewith must be done,' add 'In the case of the building joining the north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the supervising architect.' " (R., 5).

On April 2, 1909, after the receipt by it of said addendum, the appellant submitted its proposal to furnish all labor and material required for said work for the sum of \$79,400, and on May 22, 1909, the United States, acting therein through J. B. Reynolds, Assistant Secretary of the Treasury, sent the appellant a communication accepting its said proposal in the following language:

"In accordance with Department approval of the 18th instant, your proposal, dated April 2, 1909, the lowest received under advertisement of February 26, 1909, and opened April 3, 1909, in amount seventy-nine thousand and four hundred dollars (\$79,400.00), is accepted to furnish all the labor and materials required for the construction of the foundation for the extension, remodeling, etc., of the United States Assay Office building, New York, N. Y., in strict accordance with drawings numbered 101 and 102, such other drawings as may be furnished, the specification dated February 26, 1909, and the addendum thereto dated March 18, 1909, and the instructions of the superintendent.

* * * * *

"It is understood and agreed that you are required to execute a formal contract, with bond, in the sum of one hundred and twenty-five thousand dollars (\$125,000.00), guaranteeing the faithful performance of the work embraced in this acceptance, a form for which will be forwarded you." * * * (R., 5, 6).

Thereafter, and on or about May 24, 1909, the United States, acting therein through said J. B. Reynolds, Acting

Secretary of the Treasury, entered into a contract in writing with the claimant for the performance of said work for said price of \$79,400. Said contract is set forth at pages 6 and 7 of the record.

The Assay Office extension was located practically in the middle of the block bounded by Wall, Nassau, Pine, and William streets. The buildings surrounding the site of the excavation for the work were the old Assay Office on the south, the Subtreasury building on the west, the two buildings 25 Pine street and 27 and 29 Pine street on the north, and the Gallatin Bank building on the east.

When the appellant submitted its detailed drawings showing the proposed method of underpinning and protecting the walls of the Pine Street buildings, the supervising architect telegraphed to it, on August 3, 1909, as follows:

"Referring to blue prints submitted by you showing underpinning buildings Pine street, please state why drawing does not show underpinning twenty-five Pine street extending to rock" (R., 8).

To which the appellant replied on the same day:

"We are in receipt of your telegram under date of August 3rd, and in reply will say that according to the 'Addendum to the specifications for the foundation of the extension, remodeling, etc., of the United States Assay Office building at New York, N. Y.,' we understand that the 'building' referred to means No. 27-29 Pine street, as No. 25 Pine street has no rear wall; it is simply a light metallic curtain wall which is supported on the side walls. We did not consider that there was any rear wall in this building, therefore we show the side walls to be taken care of in the usual manner and believe our method so provides" (R., 8).

Thereupon much correspondence ensued between the supervising architect and the appellant in reference to the contract requirements and necessity for the underpinning

to rock of the building No. 25 Pine street (R., 8), and on October 20, 1909, appellant was ordered by the supervising architect to proceed with the work of underpinning said building, 25 Pine street, to rock as follows:

"The receipt is acknowledged of your letter of the 15th instant, and the statements made therein are noted.

"In reply, you are advised that the position of the office in regard to underpinning to rock No. 25 Pine street, in connection with your contract for the foundations of the extension, remodeling, etc., of the Assay Office, New York, N. Y., was fully set forth in its letter to you of the 2d instant, and the office is of the opinion that this work is required by the terms of your contract and that you are not entitled to an extra therefor.

"You are therefore directed to carry out this portion of your contract without further delay, and in accordance with office letter of the 2d instant" (R., 8).

The appellant thereupon, on October 28, 1909, notified the supervising architect that the estimated cost of underpinning to rock the two southernmost columns of the east and west walls of said building, 25 Pine street, would be \$4,800, in addition to the price named in said contract, and concluded its said communication with the following statement:

"As the contract does not expressly or impliedly require us to underpin to rock premises 25 Pine street, we shall proceed with the work under the contract, taking necessary steps to protect said premises, but will not underpin any portion thereof to rock except upon the understanding that we are to be paid the reasonable cost thereof, as indicated above" (R., 8).

To which the supervising architect replied on October 30, 1909:

"Your statements are noted and you are now directed to proceed without further delay to complete the work in line with office letters of the 2d, 20th and 26th inst., and without expense to the Government, and you are advised that unless you take action along this line within a reasonable time, consideration will be given to serving the eight days' notice preparatory to the Government assuming charge of the work and completing it at your expense" (R., 8, 9).

Upon appeal to the Secretary of the Treasury the action of the supervising architect was ratified and the appellant was directed in writing by the Secretary to proceed with said underpinning in accordance with the requirements of the supervising architect, otherwise the contract would be completed at its expense (R., 9). The appellant did the extra work under protest (R., 9), and completed it and all of the work under said contract within the time stipulated in the contract and to the satisfaction of the representatives of the United States, at an actual increased expense, for the underpinning to rock of the building 25 Pine street, of \$4,450 (R., 9).

To underpin said premises to rock the appellant was required to sink two cylinders, one under the last column on the east side of the building 25 Pine street, and one under the last column on the west side of said building. To do this it was necessary to remove the earth from under these columns and sink the cylinders to rock in the excavations made for them. In connection with the sinking of the cylinder under the east side of the building a drift or tunnel 10½ feet long, 6 feet wide, and 6 feet high had to be run from the extreme rear of the foundation to a point under the column, and from this drift the cylinder was sunk to rock to a depth of approximately 40 feet. On the west side a drift 5 feet wide, 5 feet deep, and 6 or 7 feet high was made and a similar cylinder sunk to the same depth. Each cylinder or caisson was built of concrete and steel and was 3½ feet in diameter (R., 9).

Prior to the receipt by the appellant of the order of the United States to protect the rear wall of the building No. 25 Pine street by underpinning to rock, appellant had proposed to protect said building by means of horizontal beams projecting through the building and supported on the ground by blocks and posts called rakers and needle beams. This was the method adopted as to the Gallatin Bank building, the foundation of which extended below the depth of the proposed excavation.

The cost of the method of protecting by shoring up with timbers was nominal as compared with the cost of underpinning.

The use of the word "building" in the addendum to the specifications was the result of a clerical error in the office of the supervising architect of the Treasury. Between the date of issuing the specifications and the time of opening the bids the drafting and construction division of the supervising architect's office concluded that it was necessary to underpin to rock the two buildings 27 and 29 Pine street and 25 Pine street, and, in order that the bid and subsequent contract might cover all of the work, that division prepared a memorandum for the addendum to the specifications to be sent to all bidders, which read:

"Bidders are hereby informed that the specification is to be amended as follows:

"'Page 7, fourth paragraph, under "Excavation," after the clause "and all necessary shoring, underpinning, etc., in connection therewith must be done," add "In the case of the buildings joining north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the supervising architects.'"

This memorandum for the addendum was, in due course, sent to the computing division of said office, where the word "buildings" was inadvertently changed to "building" in the addendum to the specifications, which was sent to appellant under date of March 18, 1909.

The building known as 25 Pine street was 10 stories in height above Pine and 11 stories above Wall street.

The main rear wall of the building 27 and 29 Pine street was of brick and masonry, and above the level of the first story was carried on the steel frame of the building. This steel frame is supported by columns which extend down to the basement line and were carried there on a system of built-up steel girders, filled in with concrete, making a broad foundation for the columns.

The main rear wall of the building No. 25 Pine street was of angle iron covered with sheet metal and carried by columns of steel resting on corner columns of the building. The weight above the first floor was transferred to the side walls and columns and from the columns to the foundation.

ARGUMENT AND AUTHORITIES.

Construction of the Contract.

The court below construed the addendum to the specification, calling upon the contractor to underpin to rock the main rear walls of the *building* joining the north line of the site of the excavation, to require it to underpin the main rear walls of *two adjoining buildings*, upon the theory that, prior to submitting its proposal, the contractor had been invited to visit the site and might have ascertained that there were two buildings contiguous thereto on the north, which the supervising architect desired to have underpinned, and that it could not rely upon this precise and unambiguous language of the addendum, nor upon its judgment as an expert contracting engineer that the addendum referred to a single building, 27-29 Pine street, having a heavy masonry rear wall which might crumble and crack, and not to the adjacent building, 25 Pine street, which had a light curtain wall composed of a sheet of metal, which was not likely to be endangered (R., 8).

This decision is directly in conflict with the just and equitable principle, firmly established many years ago by this court, that a contractor cannot be required, without compensation, to double the quantities of work actually specified in an advertisement for proposals prepared by the Government, by recourse to general requirements, calling upon the contractor to visit the site and inform himself of what was needed.

It seems to us that the leading case of the United States *vs.* Stage Company (199 U. S., 414) is decisive of the question here involved. There, this court, in reviewing a contract for carrying the mails, held:

"The second question involved is as to the right of the contractor to recover because the Government's advertisement for proposals, instead of stating the number of elevated stations to be served at *four*, which was, in fact, the number, gave the number of stations at *two*, thus doubling the number of trips necessary. It is true that the advertisement required the bidders to inform themselves as to the facts, and stated that additional compensation would not be allowed for mistakes; but, in the present instance, the Government, in its advertisement, had positively stated the number of stations at two. The contractor had a right to presume that the Government knew how many stations were to be served; it was a fact peculiarly within the knowledge of the Government agents and upon which, in the advertisement, it spoke with certainty. We do not think, when the statement was thus unequivocal, and the document was prepared for the guidance of bidders for Government service, that the general statement that the contractor must investigate for himself, and of non-responsibility for mistakes, would require an independent investigation of a fact which the Government had left in no doubt" (p. 424).

See also Beach on the Modern Law of Contracts, sec. 716.

As this contract, and the specifications and addendum forming a part thereof, were not drafted by the claimant, but by the representatives of the United States—the officials of the supervising architect's office—and the error in substituting the word "building" for "buildings" was made in that office, the ambiguity, if there is any in the language of the contract, taking it as a whole, must be resolved against the United States.

Beach, *id.*, sec. 726.

Chambers vs. U. S., 24 Ct. Cls., 387, and cases there cited.

Otis vs. U. S., 20 Ct. Cls., 315; 120 U. S., 115.

Edgar and Thompson Works vs. U. S., 34 Ct. Cls., 205.

Gibbons vs. U. S., 109 U. S., 200.

Garrison vs. U. S., 7 Wall., 688.

"Words are construed most strongly against the party using them. This rule is based on the principle that a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes that the court will adopt a construction by which they would mean another thing, more to his advantage" (Anson, Law of Contract, p. 328).

In *Collins vs. United States* (34 Ct. Cls., 294) it was held that a contractor who excavates the number of cubic yards required by his contract is entitled to compensation for extra excavation below grade, called for by the engineer in charge, notwithstanding a provision in the contract providing: "The lock pit must be excavated to the width and length and depth which the engineer in charge shall deem necessary."

A specific provision in a contract calling for one injector and one pump controls general provisions of a contract that

everything needed for a lighthouse shall be supplied to make it ready for use.

Erickson *vs.* U. S., 107 Fed., 204.

See also Salt Lake City *vs.* Smith, 104 Fed., 457, 466.

Nor should the United States be permitted to escape the consequences of the erroneous omission of its own representatives by shielding itself behind the special provision of the contract, making the decision of the supervising architect as to the quality and quantity of materials furnished *under* the contract final, or the general provision that "the decision of the supervising architect as to the proper interpretation of the drawings and specifications shall be final." These clauses do not and cannot relate to extra labor and material which the specifications failed to embrace and the contract did not cover, and for which the claimant seeks compensation upon a *quantum meruit* (Salt City *vs.* Smith, *supra*). But if they did, and the supervising architect is to be regarded as the sole arbiter, the claimant would not be bound by his *manifest mistake of law* (U. S. *vs.* Farragut, 22 Wall., 406, 420). The construction and interpretation of the language of this contract and these specifications is unquestionably a matter of law, and it will hardly be contended that the words "building" and "buildings" are manifestly the same.

In this case the officials of the supervising architect's office, when they drafted the memorandum for the addendum to the specifications, designedly employed the word "buildings" in order to bring forth proposals for the underpinning to rock of the building 25 Pine street as well as the building 27 and 29 Pine street. Through an error in that office for which the contractor was in no way responsible and of which it had no knowledge, the United States invited and obtained from the appellant a bid for the underpinning of only one, instead of both, of these buildings. If the addendum to the specifications had required the under-

pinning of "buildings" instead of "building," the appellant's proposal would have been increased accordingly, and the United States is not, therefore, being called upon to pay for anything beyond what its representatives intended and expected to pay when the memorandum for the addendum was drafted (R., 9-10).

The appellant recognized its obligation under its contract to make the excavation "in such a manner as not to endanger adjoining property"; had given to the United States a bond in the large sum of \$125,000 to secure the faithful performance of this and all other provisions of said contract, and was proceeding in the usual way and in accordance with the usual engineering practice to take all precautions necessary for the protection of the adjoining buildings (R., 8). The general obligation of the contract regarding the *protection* of adjoining property by "*necessary shoring*" was entirely distinct from the subsequently added clause of the addendum regarding *underpinning*. As there were two buildings joining the north line of the site, but only one of them (27 and 29 Pine street) had a rear masonry wall (R., 10), the appellant submitted its detailed drawings showing the proposed manner of underpinning the latter building to rock in accordance with the addendum to the specifications and the method by which it proposed to protect and shore up the other building (25 Pine street) by means of heavy beams of timber (R., 8).

After the work of excavation was begun nothing developed to make it necessary to adopt any other than this *means of protection* for the building 25 Pine street, which was the method successfully employed with the consent of the Government representatives for the protection of the Gallatin Bank building, a more massive and heavier structure, immediately adjoining on the east the assay office excavation (R., 8-9).

The expense of the method which the appellant proposed to adopt for the protection of the building 25 Pine street, and did use in protecting the Gallatin Bank building, was

nominal as compared with the cost of forcing steel and cement caissons to bed rock (R., 9).

The United States cannot, therefore, in the independent clause of the contract relating to the *protection* of buildings, which it was not called upon to invoke, find support for its contention based upon another and separate clause relating to *underpinning*.

Finality of the Decision of the Supervising Architect.

The court below reached the conclusion that the determination of the supervising architect as to the meaning of the disputed phrase of the addendum was binding upon the contractor under the general provision of the contract that "the decision of the supervising architect as to the interpretation of the drawings and specifications shall be final" (R., 12).

But the authority of the supervising architect regarding this matter, as well as his power to inspect all materials furnished and work done under the contract and render a final decision as to quality and quantity of such materials, is not supreme and irreviewable, but, as this court has decided time and again, such power must be exercised reasonably and not arbitrarily, and cannot be employed as a shield to protect the supervising architect or other contractual arbiter from such gross mistakes of fact or errors of law as necessarily imply bad faith.

The court below, in Moore's case (46 Ct. of Cls., 139, 172), in construing a contract giving the Government engineer full power of inspection, supervision, and rejection, held that the contractor could not be made to bear the loss arising from defects in the plan for which such engineer and not the contractor was responsible. Applying that well-settled equitable rule to the facts of this case, the appellant should not be compelled to suffer loss by reason of errors in the specification admittedly made by the supervising architect. The appellant agreed to be bound by the supervising architect's

reasonable decisions regarding the quantity and quality of material to be supplied under the contract and the proper interpretations of the drawings and specifications—not by his mistakes of both fact and law necessitating expensive additions to the contract work.

See also—

- O'Hare's case, 18 Ct. of Cls., 646; 122 U. S., 640.
Roettinger's case, 26 Ct. of Cls., 391.
Axman's case, 47 Ct. of Cls., 537.
Ripley *vs.* The United States, 223 U. S., 695, 701, 702.

If this contract had been for the erection of a *building* and, after the detailed plans were submitted, the officer who prepared the specifications and who had erroneously stipulated one building, insisted that two buildings were intended by him and the contract must be construed to mean two, could such a decision be regarded as a finality under a general clause giving him the right to interpret the drawings and specifications? On the contrary, would not his action in thus attempting to cover up his mistake and obtain two buildings for the price of one savor of bad faith and indicate a refusal to exercise an honest judgment?

Courts strictly construe agreements for compulsory arbitrations (136 U. S., 255) because they deprive the judicial tribunals of their proper jurisdiction, and, as Mr. Justice Lamar held in Ripley *vs.* The United States, *supra*, they will never permit an arbitrator to cover up a gross mistake of fact by making a grosser mistake of law.

When the supervising architect drafted the addendum to the specifications he deemed it necessary to use the plural "*buildings*" in order to obtain the desired proposals from prospective bidders for the underpinning of the two buildings; but when he discovered that through "inadvertence" he had employed the singular "*building*" he insisted that this word was the equivalent of "*buildings*" and compelled the contractor to perform \$4,450 worth of additional work,

without compensation, under threat of forfeiture of a contract involving \$79,400, and for the performance of which the contractor had given bond in the penalty of \$125,000.

The Decision of the Court of Claims Reforms the Contract to Express the Intention and for the Exclusive Benefit of One of the Parties.

The court below found that through "inadvertence" the word *building* instead of *buildings* was used in the addendum and reformed the contract to conform to the unexpressed intention of the Government officers, thereby permitting the party at fault to profit by his own negligence, while denying any relief to the other contracting party.

An equity court may reform a contract for a mutual mistake and place the parties thereto in the position they would have occupied had the mistake not been made, but we know of no authority for the position that a court of chancery may remodel a contract to accord with the intentions and understandings of one of the parties at the sole cost of the other party thereto.

This principle is clearly set forth in the leading case of *Hearne vs. The Marine Insurance Company* (20 Wall., 488, 490), where Mr. Justice Swayne says:

"The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred.

"The party alleging the mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. The mistake must be

mutual, and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified."

Which is quoted with aproval in *Moffett, Hodgkins & Co. vs. Rochester*, 178 U. S., 384.

Although the Court of Claims has announced that it is not engaged in the singular office of "doing right to one party at the expense of a precisely equal wrong to another" (*Cramp & Sons vs. United States*, 46 Ct. of Cls., 536), we respectfully submit that it has done so in this case, and that the judgment appealed from should be reversed and the cause remanded with directions to enter judgment in favor of the appellant for the sum of \$4,450.

FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
Attorneys for Appellant.

(30366)

With Spring

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Memorial—Lorraine King

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

MERRILL-RUCKGABER COMPANY, APPEL-
lant,
v.
THE UNITED STATES. } No. 281.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

This is an appeal from a judgment dismissing the petition.

The action arose by reason of a contract with appellant for the extension and remodeling of the assay office building located on Wall Street, New York, N. Y., in accordance with drawings and specifications prepared by the Supervising Architect of the Treasury. The specifications (Finding II, Rec. 4, 5) contained, in substance, the following provisions: That bidders were to inform themselves of the conditions under which the work was to be performed; that the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications was to be final; that under the specification covering "Excavation" all necessary

shoring and underpinning must be done by appellant in such a manner as not to endanger adjoining property.

Approximately two months previous to the signing of the contract the Supervising Architect added the following paragraph to the specifications (Finding III, Rec. 5):

Bidders are hereby informed that the specification is to be amended as follows: Page 7, fourth paragraph, under "Excavation," *after the clause* "and all necessary shoring, underpinning, etc., in connection therewith must be done," add "In the case of the building joining the north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the Supervising Architect." (Italics ours.)

The buildings surrounding the site of the excavation for the work were the old assay office on Wall Street, to the south, the Subtreasury on Nassau Street to the west, the two buildings, 25 Pine Street and 27-29 Pine Street on the north (27-29 being one building), and the Gallatin Bank Building on William Street to the east. The building designated as 25 Pine Street was ten stories, and 27-29 Pine Street was thirteen stories above the grade of Pine Street. Each of these buildings was one story higher in the rear and at the line of the assay office extension. (Finding VI, Rec. 7.)

When appellant submitted its detail drawings showing the proposed method of underpinning and protecting walls of adjoining buildings, a contro-

versy ensued between the company and the Supervising Architect as to the requirement for underpinning 25 Pine Street to rock. Appellant asserted that because the word "building" appeared in the addendum above quoted, the company was required to underpin one building only, and of its own volition selected the one numbered 27-29 Pine Street. As to the other building, No. 25 Pine Street, appellant contended that ordinary shoring with blocks and posts, known as rakers and needle beams, was sufficient support during the progress of the work.

After much correspondence the Supervising Architect finally notified appellant that the work of underpinning No. 25 Pine Street was required by the terms of the contract, without additional pay therefor, and stated that unless action along this line was taken within a reasonable time, consideration would be given to serving the eight days' notice preparatory to the Government assuming charge of the work and completing it at the company's expense.

Upon ratification by the Secretary of the Treasury of the action of the Supervising Architect, appellant performed the work under written protest and, the court found, at a cost of \$4,450.00 for underpinning the building at No. 25 Pine Street. (Finding VI, Rec. 7-9.)

Appellant's position is that as the specifications and addendum to the contract were drafted by the Government representative, and the error in inserting the word "building" instead of *buildings* in the

addendum was made by the Government, the ambiguity, and the cost to appellant resulting therefrom, must be resolved against the United States. (App. brief, p. 10.)

The Government maintains that the specifications under the subject of "Excavation" (Finding II, Rec. 5) required "all necessary shoring and underpinning, etc.,," in connection with the excavation to be done by appellant, and "the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications" was to be final; that his requirement of underpinning No. 25 Pine Street could not, therefore, be questioned; that the addendum (Finding III, Rec. 5) amending the specification under the heading "Excavation" was to come "after the clause 'and all necessary shoring, underpinning, etc.,'"" indicating very clearly that it was not to be in lieu of anything in the general specification, or a limitation upon the general specification requiring shoring and underpinning, but simply an amplification of the excavation specification; that the addendum itself clearly calls for underpinning of all of the main rear walls joining the north line; that the word "building" as explained by the words "rear walls," must be read as *buildings*; that appellant is estopped from asserting a misunderstanding as to the conditions, because it was required to and did make a previous examination and had equal opportunity with the Government of knowing the situation.

BRIEF OF ARGUMENT.

First. The Supervising Architect being authorized to require underpinning where necessary, his judgment can not be questioned in the absence of bad faith on his part.

Second. The contract required appellant to make its own investigation, and having responded thereto and obtained full information, it can not be heard to complain.

FIRST.

The Supervising Architect being authorized to require underpinning where necessary, his judgment can not be questioned in the absence of bad faith on his part.

The specifications (Finding II, Rec. 4) state:

Any items which may not be indicated on the drawings or mentioned herein, but are necessary to complete the entire work, must be supplied in place. The decision of the Supervising Architect as to the proper interpretation of the drawings and specifications shall be final.

Under the heading "Excavation" it is provided:

Certain portions of old foundation walls, etc., have been left in place as retaining walls in connection with adjoining buildings; the removal of these walls and the north wall and so much of the present front building as may be necessary to install work under this contract and such other excavation in connection therewith as may be necessary are to be included. * * *

The walls, etc., will have to be removed and the excavation made in such a manner as not to endanger adjoining property nor prevent the occupancy of the present front building, *and all necessary shoring and underpinning, etc., in connection therewith must be done.* (Rec. 5.)

The contract provides (Finding V, Rec. 7):

It is further covenanted and agreed by and between the parties hereto that all materials furnished and work done under this contract shall be subject to the inspection of the Supervising Architect, the superintendent of the building, and of other inspectors appointed by the said party of the first part, with the right to reject any and all work or material not in accordance with this contract, and the decision of said Supervising Architect as to quality and quantity shall be final.

No conduct such as to imply bad faith on the part of the Supervising Architect in requiring the underpinning for the rear wall of No. 25 Pine Street was alleged, proven, or found in this case. In the absence of such a finding his decision that the underpinning was necessary on the said premises is final and should foreclose appellant's contention.

Martinsburg & Potomac R. R. v. March,
114 U. S. 549;

Chicago, Santa Fe, etc., R. R. v. Price, 138
U. S. 185;

Kihlberg v. U. S., 97 U. S. 398;

United States v. Gleason, 175 U. S. 588;

Fruin-Bambrick Const. Co. v. Ft. Smith & W. R. Co., 140 Fed. 465.

Appellant, however, asserts in effect that the addendum amending the paragraph under "Excavation" heretofore quoted repeals the other part of the specifications giving the Supervising Architect the final decision in determining where underpinning is necessary. The addendum is as follows:

Bidders are hereby informed that the specification is to be amended as follows: Page 7, fourth paragraph, under "Excavation," *after the clause* "and all necessary shoring, underpinning, etc., in connection therewith must be done," add: "In the case of the building joining the north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the Supervising Architect." (Finding III, Rec. 5.)

It is seen that the addendum sets out specifically that on "the north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the Supervising Architect." Pine Street is the north line of the site and where buildings 25 and 27-29 are located.

Counsel also seem to overlook the effect of the location of the addendum in the specification. The words "*after the clause*" "*and all necessary shoring, underpinning, etc.*" are the key to the situation. In other words, the phrase "*after the clause*" indicates that the addendum is not to be in lieu of anything appearing in the specification but is an amplification by the way of emphasis and direction to appellant as to the underpinning required for the north line of the site, as the north line was the danger

line. It does not in any way limit the Supervising Architect's authority in declaring where underpinning shall be required. Moreover, the word "building" might well mean Nos. 25 and 27-29 Pine Street, for they are both very narrow buildings and are walled against each other. The court, however, found (Finding IX, Rec. 9) that "the use of the word 'building' in the addendum to the specifications was the result of a clerical error in the Office of the Supervising Architect of the Treasury."

In attempting to wrench the word "building" from the addendum and to interpret it apart from the rest of the contract, appellant calls to its support the case of *United States v. Stage Company* (199 U. S. 414). There the Government, in advertising for proposals for the delivery of mails at certain points in New York City, represented that there were *two* stations on an elevated street railway to be supplied. The statement of the number of stations was unequivocal. The advertisement was prepared by the Government for the guidance of bidders. It contained a general statement that the contractor must investigate for himself. It developed that there were four stations instead of two, thus requiring double service. Appellant did not make any investigation, but relied on the representations contained in the advertisement.

The language was definite. *Two* stations were to be served; no more, no less. There was no room for doubt. There was nothing to suggest to the bidder that investigation should be made to ascertain

the number of stations and the situation was peculiarly within the knowledge of the Government agents. The court held that under the circumstances the representation as to the number of stations was in the nature of a warranty; that the bidder was not bound to make an investigation, and the Government was liable for additional compensation.

In the case at bar there was the general clause giving the Supervising Architect the final decision as to where underpinning should be placed. It was general and not limited. The addendum specifically says "rear walls," which, as a descriptive term, would certainly indicate the wall of No. 25, as well as 27-29 Pine Street. The words "rear walls" being plural must apply to the walls of the two buildings on the north side. This is further borne out by the finding that the word "building" was a clerical error.

Appellant is estopped from asserting that the word "building" should be read apart from the rest of the context to mean only one building. If it did mean one building, upon what theory could appellant assert the right to underpin 27-29 and not 25 Pine Street? What authority did the company have to make the selection? The absurdity of appellant's position is apparent.

This court has held that though a word in a contract when standing alone may denote the singular, but when read with the rest of the contract the plural is indicated it shall be so construed.

In the case of *O'Brien v. Miller* (168 U. S. 287) the word "vessel" in a bond was construed to mean

vessels. There an American ship, the *Johnson*, voyaging to Hamburg, sprung a leak and put in at Colloa. Part of the cargo was transferred to the *Leslie*, a British bark, and the *Johnson* was repaired. A bottomry bond to meet the expenses of the repairs was executed on the *Johnson* and its cargo, and the portion of the cargo transferred to the *Leslie* providing that if the said vessel was lost by the perils of sea, etc., then the obligation was to become void. Both vessels sailed. The *Johnson* was sunk. The consignees of the cargo on the *Leslie* being required to pay the whole amount of the bond, brought suit to recover from the owners of the *Johnson* their share of the sum paid on the bottomry bond.

Mr. Justice White said:

The libellants assert that from the terms of the bond as a whole it manifestly results that the cargo of the *Leslie* was liable despite the loss of the *Johnson* and her cargo; that hence the consignees of the cargo on the *Leslie* were obliged to pay the bond, and that on their doing so there arose a legal duty on the owner of the *Johnson* to pay the proper proportion thereof, which obligation, it is claimed, can be enforced despite the loss of the ship, since the owner had recovered and retained the amount awarded against the *Thirlmere*.

On the other hand, the respondent asserts that the words of the bond providing for its avoidance in case of the loss of "said vessel" are free from ambiguity and give no room for construction. * * *

In passing upon the question of the meaning of the contract (pp. 296-297), the court said:

There can be no doubt that, considered in themselves and alone, there is no ambiguity in the words found in the clause of the contract providing that "if during said voyage an utter loss of the 'said vessel' by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall inevitably happen, * * * this obligation shall be void." But the question presented involves not the interpretation of this language apart from the whole agreement, but is, on the contrary, the ascertainment of the meaning of the entire contract. The fallacy which underlies the assertion as to want of all ambiguity in the bond arises, therefore, from presupposing that in order to establish want of ambiguity in a contract a few words can be segregated from the entire context, and that because the words thus set apart are not intrinsically ambiguous there is no room for construing the contract itself. In other words, the confusion of thought consists in failing to distinguish between the contract as a whole and some of the words found therein. If the erroneous theory were the rule, then, in every case, it would be impossible to arrive at the meaning of a contract, in the event of difference between the contracting parties, since each would select particular words upon which they relied, and thus frustrate a consideration of the whole agreement. The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the

whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties and the intention which they have manifested in forming them.

And on page 299, the court used this language:

Deriving the meaning of the parties from their situation and their intentions as declared in the contract, it becomes impossible in reason to construe the word "vessel" in the defeasance clause as not applying to both the *Johnson* and the *Leslie*.

Again viewing the contract in the case at bar in the light of the geographical situation, it is apparent that the Supervising Architect did not exceed his authority in requiring the underpinning of both buildings on the north line of the site.

Between the foundation line of the assay office extension and the center of the nearest column of the building at 25 Pine Street there was only $5\frac{1}{2}$ feet of space; while 27-29 Pine Street was $9\frac{1}{2}$ feet distant from the foundation line of the assay office extension building. This would indicate even a greater necessity for underpinning 25 Pine Street. Moreover the subsoil 2 to 3 feet below the surface to within a few feet of bedrock, 50 feet below, was quicksand, a most precarious situation upon which to rest the exposed foundations of a building ten stories high.

Appellant argues that because the Gallatin Bank Building was shored with blocks and posts only that the same might have been done at 25 Pine Street.

The fallacy of this contention is apparent in view of the fact that 25 and 27-29 Pine Street were exposed for 15 feet below the bottom of their foundations, while the Gallatin Bank Building extended below the proposed excavation of the assay office building. It had supports unexposed and it was not necessary to underpin it.

Counsel would have us draw the inference that because 25 Pine Street was backed with a "curtain wall" of angle iron covered with sheet metal, it would not require underpinning as would 27-29 Pine Street, because the latter was of brick. The fact is (Rec. 10) that both the walls of 25 and 27-29 were curtain walls, and, while the brick and masonry thereof might have been a little heavier, the pressure exerted on the foundation of 25 Pine Street by the 10 stories above was so great that the Supervising Architect was certainly within his powers in requiring an underpinning thereof, in view of the fact that the entire rear foundation was exposed and was resting upon quicksand.

SECOND.

THE CONTRACT REQUIRED APPELLANT TO MAKE ITS OWN INVESTIGATION, AND HAVING RESPONDED THERETO AND OBTAINED FULL INFORMATION, IT CAN NOT BE HEARD TO COMPLAIN.

The bidders were required to visit the locality and fully inform themselves. Under the heading "Extent of work" (Finding II, Rec. 4) it was required that—

The bidders should visit the site and fully inform themselves of the character of the

same and the conditions under which the work is to be performed, and failure to do so will in no way relieve the successful bidder from the necessity of furnishing any materials or performing any labor that may be required to complete the work in accordance with the true intent and meaning of the specifications and drawings without additional cost to the Government.

Responding to this specification a thorough examination was made. In Finding IX (Rec. 10) it says:

Before submitting a proposal for the work the claimant, through its president and agents, made an investigation of the site of the work and the buildings surrounding said site, and ascertained that the rear of both the buildings, Nos. 25 and 27 and 29 Pine Street, were close to said site on the north.

Judge Atkinson, in his opinion (p. 12, Rec.), says:

The claimant's president visited the site of the proposed work, as did also his engineer. The surrounding conditions were known to them. They knew that there were two buildings, the rear of which adjoined the site. One of these, 27 and 29 Pine Street, was built up of brick or masonry from the top of a one-story extension, while the other from the top of the first-story extension was constructed of metallic sheets supported on the framework of the building. The weight at the rear of the building, No. 25 Pine Street, was carried on pillars at either end of the side walls, and the south ends of these walls were several feet nearer the proposed excavation than was the rear wall of the other building.

If it were necessary to show any further knowledge on the part of appellant, the testimony of Mr. Merrill, president of the company (which testimony is not and can not be contradicted), upon which the aforesaid finding and opinion rest, would certainly estop appellant from any claim of lack of knowledge. An excerpt from his testimony is as follows:

130. xq. What investigation, if any, did you make of the foundations of these various structures surrounding this assay office before submitting a proposal for the work under this contract?

A. I looked personally at the site of the work and had our engineers make a sketch of the conditions pertaining at the time.

131. xq. Did that sketch relate to surface indications?

A. I don't quite understand that.

132. xq. Were these engineers investigating the underlying conditions of the foundations of the adjoining buildings?

A. Yes; and my general knowledge of the soil in New York and the vicinity told me exactly what was underneath the building.

133. xq. Independent of your general knowledge, what investigations did your engineers make of that subject?

A. They obtained information from the departments by going to the building department in New York and looking up the records in regard to the construction of these old buildings, to see the nature of them and how they were put together.

While the foregoing testimony is not in the record, the Government believes that it is explanatory of

findings based on this testimony, and for this reason, since it is the uncontradicted testimony of a member of appellant company, has taken the liberty of submitting the same for the court's consideration.

In view of this examination and of the knowledge derived therefrom it must be apparent that appellant had equal opportunity for investigation and information with the Government. Having availed itself of the information it can not now call to its support the doctrine laid down in the Stage Company case where no investigation was made and where the court said that the stage company had the right to rely upon the unequivocal declaration in the proposals that there were only two stations to be served. This case does, however, come within the rule laid down in *Farnsworth v. Duffner* (142 U. S. 43). There the court held (pp. 47-48) that where the complaining party does not rely upon the representations made by the other party, but seeks from other quarters means of verification of the statements made and acts upon information thus obtained, he can not be heard to say that he was misled by the representations of the other party.

CONCLUSION.

The text of the contract so unequivocally empowered the Supervising Architect to require the underpinning of the said premises that it is respectfully submitted that the decision of the Court of Claims should be sustained.

HUSTON THOMPSON,
Assistant Attorney General.



Office Supreme Court, U. S.

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JAMES D. MAHER

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 281.

MERRILL-RUCKGABER COMPANY, APPELLANT,

vs.

UNITED STATES.

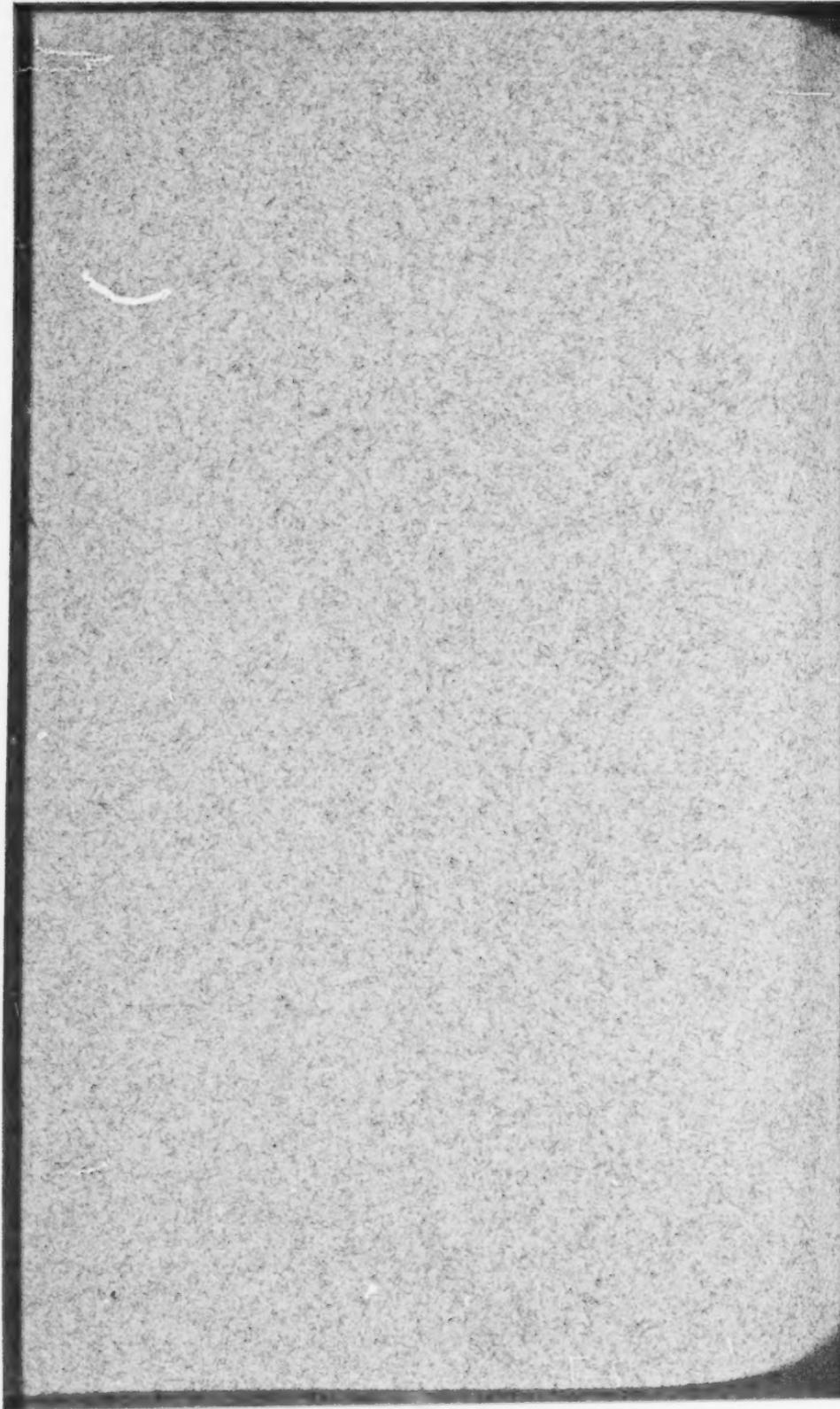
APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

FREDERIC D. MCKENNEY,

JOHN S. FLANNERY,

Attorneys for Appellant.



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MERRILL-RUCKGABER COMPANY, APPELLANT,

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UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

Beginning our reply where the brief of the learned Assistant Attorney General concludes, if, as he asserts, "the text of the contract so unequivocally empowered the Supervising Architect to require the underpinning" of *two* buildings instead of *one*, why was that officer so industriously precise in his draft of the addendum to the specifications to use the plural "*buildings*" to express his meaning?

And when he found that he had erred and in consequence of his error had received from an unsuspecting contractor a bid for the underpinning of one building instead of two,

would not good faith and fair dealing have called for a frank admission of his error and the reopening of the matter upon which the minds of the parties had never met, instead of a shifting of his previous position to enable him to obtain the benefit of the additional work, the cost of which amounted to 50 per cent of the usual estimated contractor's profit of 10 per cent derivable from the whole contract?

The learned counsel for the Government says that the court below made no finding that the Supervising Architect *was guilty* of bad faith. It is equally true that the court below made no specific finding that *he was not guilty* of bad faith. The court, however, found facts which speak for themselves and, we submit, lead to but one conclusion. The Supervising Architect, after making a costly error, sought to cover his mistake by suppressing the fact that he had made it until after appellant's testimony had brought it to light long after the suit had been instituted, by seeking to convey the impression in his correspondence with the contractor (R., 8) that the addendum to the specifications correctly expressed his meaning and that the word building meant the two buildings joining the north line of the site, by shielding himself behind other and general provisions of the specifications, and finally by exerting his arbitral power to force the contractor to comply with his demands. We submit that it requires no formal finding of fact to enable the court to determine whether or not such conduct was consistent with good faith, fair dealing, and an honest endeavor to interpret the contract and specifications.

The learned Assistant Attorney General argues that the case of the *United States vs. Stage Company* (199 U. S., 414) has no application and that the case at bar is to be controlled by the case of *O'Brien vs. Miller* (168 U. S., 287).

That was a suit in admiralty where this court was called upon to construe a bottomry bond given by the master of a vessel upon said vessel and her whole cargo (some of which had been transhipped in another vessel) to secure payment

for certain repairs made on the original vessel, for which the cargo under the admiralty law was subject to hypothecation. The original vessel having been lost and insurance and damages having been collected by her owners, upon a suit brought by the owners of the cargo to recover the cargo's proportionate share of the sum paid to the owners of the lost vessel, it was held that, as the liability for the loss of the vessel attached to the cargo as a whole, any amount recovered must likewise be apportioned among the owners of the cargo as well as the owners of the vessels containing it; that both vessels were mentioned by name in the recitals of the bond and both were undoubtedly contemplated by the contemporaneous construction of the parties, and therefore the word "vessel" in the defeasance clause of the bond should be construed to include both vessels (Op., pp. 298, 299).

The distinction between the O'Brien case and the one at bar is clearly shown in the following paragraph from the opinion of the court:

"The cargo on the *Leslie* having been hypothecated along with that on the *Johnson*, and the bond declaring that it was upon the faith of such hypothecation that the money was advanced, the claim that because of the use of the word 'vessel' in the singular, the bond was to be avoided by the loss of the *Johnson*, despite the arrival of the *Leslie*, amounts to contending that although both parties declared that the money was lent on the faith of both cargoes, and that without the pledge of both it would not have been advanced, yet that they immediately stipulated that it should be secured upon only one of the objects hypothecated.

"Deriving the meaning of the parties from their situation and their intentions as declared in the contract, it becomes impossible in reason to construe the word 'vessel' in the defeasance clause as not applying to both the *Johnson* and the *Leslie*" (p. 299).

In the O'Brien case this court was not only dealing with an unusual state of facts entirely dissimilar to those pre-

sented in this case, but with a favored contract of admiralty (Op., pp. 298, 301). The decision shows the uniform tendency of courts exercising equity and admiralty jurisdiction to treat the parties to all contracts with equal fairness. There the court held that the words of a contract should be construed so as to enable those who had shared in the obligations of a bond to also share in its benefits. Here the appellee, while admitting its mistake, seeks a construction of a contract which will give it all the benefit of that mistake and will cast all of the burden upon the other contracting party.

Although *O'Brien vs. Miller* was considered and cited many years later by this court in its decision in the leading case of the *United States vs. The Stage Co.* (199 U. S., 414), upon which appellant relies, it was not found to conflict with the ruling in the latter case that in a contract for carrying the mails upon an elevated railway "two stations" could not be stretched to include "four stations."

Counsel also contends that the case at bar does not fall within the rule laid down in the Stage Company case, but does fall within the rule stated in the case of *Farnsworth vs. Duffner* (142 U. S., 43). *Farnsworth vs. Duffner*, as the court points out in the opening paragraph of its opinion, was "a suit for the *rescission* of a contract of purchase and to recover the moneys paid thereon, on the ground that it was induced by the false and fraudulent representations of the vendor. In respect to such an action it has been laid down by many authorities that where the means of knowledge respecting the matters falsely represented are equally open to the purchaser and vendor, the former is charged with knowledge of all that by the use of such means he could have ascertained."

As we have shown, the present case is not a suit for the *rescission* of a contract, but one requiring its construction, according to the contention of the appellant, and its reformation for a mistake in language according to the theory of the appellee. It will take a wide reach of the imagination to

find any similarity between the facts and principles of the Farnsworth case and the one at bar.

The learned Assistant Attorney General seeks to amplify the findings of fact not only by references to the opinion of the court below, but also by setting forth in his brief (p. 15) certain testimony which is not recited in but forms the basis of the court's ultimate findings.

This court, in the case of *Crocker vs. United States* (240 U. S., 74, 78), has recently said:

"In the briefs reference is made to portions of the opinion delivered in the Court of Claims as if they were not in accord with the findings. We do not so read the opinion, but deem it well to observe, as was done in *Stone vs. United States*, 164 U. S., 380, 382, 383, that 'the findings of the Court of Claims in an action at law determine all matters of fact precisely as the verdict of a jury,' and that 'we are not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings.' See also *Collier vs. United States*, 173 U. S., 79, 80; *United States vs. New York Indians*, 173 U. S., 464, 470."

With every desire to respect and abide by this ruling, but in order to prevent this court from being misled by matter imported into the record through the medium of the Government's brief and by the statement in the concluding paragraph of the opinion of the Court of Claims, "that the intention from the beginning was to require the underpinning of both buildings" (R., 13), we invite the court's attention to the following important evidence in the record below, which the Court of Claims refused to incorporate in its findings (Court of Claims Record, p. 9):

"MERRILL-RUCKGABER Co.

"NEW YORK, August 21st, '09.

"*Re U. S. Assay Office Foundation.*"

"THE SUPERVISING ARCHITECT,
Treasury Department, Washington, D. C.

"DEAR SIR: In connection with the underpinning of 25 Pine street to rock, wish to say that we have given this subject further careful consideration, and have come to the conclusion that in view of the fact that we do not contemplate any such work in our bid price, we feel, as indicated by our telegrams on the subject, that we should receive an extra payment if the Government requires us to underpin to rock on this building.

"Yours truly,
(Signed) "MERRILL-RUCKGABER CO.
"OGDEN MERRILL, President.

"O. M./M."

This shows that the appellant submitted a bid for the underpinning of one building only. The fact that the officers of the Government expected to pay for the underpinning of two buildings was established by the following evidence of Mr. Edward C. Heald, structural engineer of the Supervising Architect's office, who drafted the memorandum for the addendum to the specifications (Court of Claims Record, pp. 94, 95):

"19. Question. I will ask you to state whether or not, in drafting this note for the addendum to the specifications, you regarded the plural term 'buildings' as necessary, in order to cover these two buildings, 25 Pine street and 27 and 29 Pine street, and require their underpinning to rock?

"Answer. I did regard it necessary.

* * * * *

"23. Question. And in drafting your memorandum requiring buildings 25 Pine and 27 and 29 Pine

street to be underpinned to rock you expected that the Government, under the contract, would have to pay for this expensive underpinning of both buildings, did you not?

"Answer. Yes."

Respectfully submitted,

FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
Attorneys for Appellant.

(30616)

MERRILL-RUCKGABER COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 281. Argued March 17, 1916.—Decided June 5, 1916.

In construing a contract the court must at first resort to its words, but not to one or a few of them, but to all of them as associated, and as well to the conditions to which they were addressed and intended to provide for; one word cannot be made dominant, controlling all others, and putting out of view the demands of physical conditions. In this case *held* that a contractor was bound to underpin the walls of both of two buildings on the line of the Government's property, notwithstanding the specification referred to building in the singular and not plural, and the wall of one of the buildings was only a light or curtain wall.

Under the contract involved in this case, the decision of the supervising architect was made final upon any dispute regarding the proper interpretation of the specifications, and as the Secretary of the Treasury sustained the decision, and no foundation appears in the record for charges of unfairness on the part of the latter, such decision is final.

49 Ct. Cl. 553, affirmed.

APPELLANT is a New York corporation. It filed a petition in the Court of Claims for the recovery from the United States of the sum of \$4,475.90 for extra work performed in the construction of the foundation for the

extension and remodeling of the United States assay office in New York. Issue was joined on the petition and the Court of Claims, after hearing, dismissed it. 49 Ct. Cl. 553.

The facts pertinent to the questions presented, collated from the findings, are as follows:

The appellant entered into a contract with the United States through the proper officers of the latter for the construction of such foundation for the sum of \$79,400.00 in accordance with specifications and drawings prepared in the office of the Supervising Architect.

The specifications required bidders to visit the site and fully inform themselves of the character of the same and the conditions under which the work would have to be performed and failure to do so, it was provided, would not relieve the successful bidder from the necessity of furnishing material or performing any labor that might be required to complete the work in accordance with the true intent and meaning of the specifications and drawings without additional cost to the Government.

The specifications, it was provided, should supplement the drawings, and specifications and drawings were to be reciprocally explanatory and the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications was to be final.

Under the heading "Excavation" it was provided that "certain portions of old foundation walls, etc., have been left in place as retaining walls in connection with adjoining buildings; the removal of these walls and the north wall and so much of the present front building as may be necessary to install work under this contract and such other excavation in connection therewith as may be necessary are to be included . . . The walls, etc., will have to be removed and the excavation made in such manner as not to endanger adjoining property nor prevent the occupancy of the present front building, and all neces-

sary shoring and underpinning, etc., in connection therewith must be done."

Subsequently the Supervising Architect sent to all parties from whom proposals had been solicited the following addendum amending the foregoing paragraph of the specifications:

"Bidders are hereby informed that the specification is to be amended as follows: Page 7, fourth paragraph, under 'Excavation,' after the clause 'and all necessary shoring, underpinning, etc., in connection therewith must be done,' add 'In the case of the building joining the north line of the site, the underpinning of the main rear walls must be carried to rock by a method satisfactory to the Supervising Architect.'"

A detailed contract was entered into providing that the work was to be done in accordance with the specifications and the addendum thereto and the requirements of certain specified drawings and such other detail drawings and models as might be furnished to appellant by the Supervising Architect.

It was further provided that changes might be made in the work and materials when required by the United States, the value of such work and materials to be determined on the basis of the contract unit of value, at prevailing market rates, such rates, in case of dispute, to be determined by the Architect, whose decision should be binding on both parties, and that no claim for damages on account of such changes or for anticipated profits should be made or allowed. No claim for extra materials or work was to be made or allowed unless specifically agreed upon in writing or directed in writing by the United States.

The assay office extension was located practically in the middle of the block bounded by Wall, Nassau, Pine and William Streets and among the buildings surrounding the site were two on Pine Street numbered 25, 27 and 29. Number 25 was ten stories and Nos. 27 and 29 (being one

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building) was thirteen stories above the street, and each was one story higher at the line of the assay office extension.

Appellant submitted detail drawings showing its proposed method of underpinning and protecting the walls of the Pine Street buildings. Referring to the drawings the Architect telegraphed the inquiry why they did "not show underpinning 25 Pine Street extending to rock," to which appellant replied that in accordance with the addendum to the specifications it understood that the building referred to meant 27-29 Pine Street as No. 25 Pine Street had no rear wall but simply a light metallic curtain wall supported on the side walls, and that appellant did not consider there was any rear wall in the building and, therefore, it (appellant) showed the side walls to be taken care of in the usual manner and believed its method so provided.

Much correspondence ensued, and finally appellant was told that it was the opinion of the Architect's office that its letter of the 2nd instant (October, 1909) correctly set forth the position of the office and that it was of the opinion the work as therein set forth was required by the contract and that appellant was not entitled to extra therefor, and appellant was directed to carry out its contract without further delay in accordance with that letter. To which appellant replied that the cost of the underpinning to rock of the walls of No. 25 Pine Street would be \$4,800 in addition to the price named in the contract and concluded as follows:

"As the contract does not expressly or impliedly require us to underpin to rock premises 25 Pine Street, we shall proceed with the work under the contract, taking necessary steps to protect said premises, but will not underpin any portion thereof to rock except upon the understanding that we are to be paid the reasonable cost thereof, as indicated above."

"To which the Supervising Architect replied, on October 30, 1909: 'Your statements are noted and you are now directed to proceed without further delay to complete the work in line with office letters of the 2d, 20th and 26th instants, and without expense to the Government. And you are advised that unless you take action along this line within a reasonable time consideration will be given to serving the eight days' notice preparatory to the Government assuming charge of the work and completing it at your expense.'

"Upon appeal to the Secretary of the Treasury the action of the Supervising Architect was ratified, and the claimant was directed in writing by the Secretary to proceed with said underpinning in accordance with the requirements of the Supervising Architect, otherwise the contract would be completed at claimant's expense. The claimant did the work under protest, and completed it and all of the work under said contract within the time stipulated in the contract. The actual cost of underpinning to rock said building No. 25 Pine Street was \$4,450. The contractor was paid the full amount of the contract price, \$79,400."

The use of the word "building" in the addendum to the specifications was the result of a clerical error in the office of the Supervising Architect. But before submitting a proposal for the work appellant through its president and agent made an investigation of the site of the work and the buildings surrounding the site and ascertained that the rear of both the buildings on Pine Street adjoined the site on the north.

Mr. John S. Flannery, with whom *Mr. Frederic D. McKenney* was on the brief, for appellant.

Mr. Assistant Attorney General Huston Thompson for the United States.

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MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

The case is in narrow compass. It involves for its solution the construction of a contract, and the rules to guide such construction we need not rehearse. To its words we at first resort, but not to one or a few of them but to all of them as associated, and as well to the conditions to which they were addressed and intended to provide for. The argument of appellant ignores this rule. As we shall see, it makes one word dominant, controls all others by it, and puts out of view the demands of the physical conditions.

The contract provided that whatever walls would have to be removed and excavations made would have to be done in such manner as not to endanger adjoining property, and that all necessary shoring and underpinning, etc., in connection therewith had to be done. To this provision there was subsequently added that "in the case of the *building* [italics ours] joining the north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the Supervising Architect."

But there were two buildings "joining the north line of the site," and appellant selected one as the full measure of its obligation to carry the underpinning to rock as required by the specifications, giving as a reason, in a communication to the Architect's office, that it did not consider that there was any rear wall in No. 25 Pine Street, but only a metallic curtain wall.

The Architect's office was not impressed with the distinction between walls and the selection of one building joining the north line of the site but insisted that the underpinning of the main rear walls of both of the buildings joining such line must be carried to rock by a method satisfactory to the Supervising Architect. Appellant

filed its appeal to the Secretary of the Treasury, who affirmed the action of the Architect.

Counsel intimates unfairness on the part of the Supervising Architect, but there is no just foundation for it; and, besides, there is no attempt to impugn the good faith of the Secretary of the Treasury who sustained the decision of the Architect, and the contract explicitly provides that "the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications shall be final." If we may concede to appellant an ambiguity in the specifications arising from the use of the singular word "building" instead of the plural word "buildings" against the material conditions which appellant's officers had inspected and knew of and against as well the other parts of the specifications which among other things call for "rear walls" instead of a "rear wall," seemingly implying two buildings and not one only, at the utmost it could only be said that there was ground for dispute, and under the contract the decision of the Architect upon the dispute was final.

Judgment affirmed.

MR. JUSTICE McREYNOLDS took no part in the consideration or decision of this case.